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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Juan Alberto Cruz,
Petitioner,

v.

Charles L. Ryan, *et al.*,
Respondents.

No. CV-16-02784-PHX-JJT (DMF)

ORDER

At issue is the Report and Recommendation (“R&R”) (Doc. 29) in this matter entered by United States Magistrate Judge Charles R. Pyle, recommending the Court deny and dismiss with prejudice the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.) Petitioner timely filed Objections to that R&R. (Doc. 32.) Upon consideration of the above filings, the Court will adopt the R&R in whole, overrule the Objections, and deny the Petition.

Because Petitioner did not address Judge Pyle’s findings and recommendations in the R&R regarding Grounds One and Two of his Petition, the Court may accept the R&R as to those grounds without further review. The Court nonetheless has reviewed Grounds One and Two on the merits, and upon that review, finds Judge Pyle’s conclusion that Petitioner is not entitled to relief on Grounds One and Two correct in all regards. The adjudication of claims underlying Grounds One and Two rests on the determination of credibility of, and among witnesses. The determination of the witnesses’ credibility rests firmly with the trial court. While Petitioner may disagree with the trial court’s conclusions

1 on these points, its conclusions are not subject to upset, particularly in light of the fact that
2 the trial court's determinations were consistent with the plain written language of the plea
3 agreement.

4 Petitioner has not shown that the trial court's resolution of the claims underlying
5 Grounds One and Two was contrary to clearly established federal law; nor that the
6 resolution involved an unreasonable application of that law; nor that the decisions were
7 based on an unreasonable determination of facts in light of the evidence before the trial
8 court. Relief on Grounds One and Two of the Petition is thus unavailable.

9 Judge Pyle also correctly concluded that Grounds Three, Four and Five are
10 procedurally defaulted without cause or other legally cognizable excuse. In his Objections,
11 Petitioner fails to raise any point of fact or law showing error in Judge Pyle's conclusions.
12 Instead, Petitioner merely re-raises the arguments Judge Pyle had already considered, and
13 dealt with, in the R&R. Grounds Three through Five are procedurally defaulted and not
14 excused.

15 IT IS ORDERED overruling Petitioner's Objections to the R&R (Doc. 32.)

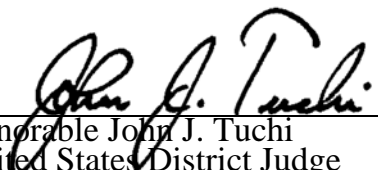
16 IT IS FURTHER ORDERED adopting in whole the R&R submitted by Judge Pyle
17 in this matter, including the underlying reasoning. (Doc. 29.)

18 IT IS FURTHER ORDERED denying and dismissing the Petition for Writ of
19 Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.)

20 IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to
21 proceed *in forma pauperis* on appeal, because the dismissal of the Petition is justified by a
22 plain procedural bar and reasonable jurists would not find the procedural ruling debatable.

23 The Clerk of Court shall enter judgment accordingly and terminate this matter.

24 Dated this 10th day of December, 2018.

25
26 
27 Honorable John J. Tuchi
28 United States District Judge